Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1313

CHARLES LOWE SNELL, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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October Term, 1974

NO._____

CHARLES LOWE SNELL, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, CHARLES LOWE SNELL, respectfully prays that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Fifth Circuit issued in this proceeding on March 24, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, a copy of which appears as Appendix "A" hereto, is reported at Fd3537. No written opinion was rendered by the United States District Court for the Southern District of Texas.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered February 14, 1975. Petitioner's Motion for Rehearing was denied on March 14, 1975. On April 7, 1975, the Court of Appeals stayed its mandate to allow Petitioner to apply to this Court for a Writ of Certiorari. The Jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Indictments under which Petitioner was convicted sufficiently state an offense, and properly apprise him of the

nature of the charges brought against him. More specifically, the language of the indictment does not conform to the statutory language of the act under which the Petitioner, CHARLES LOWE SNELL, was charged.

2. Whether certain documents material to the charge, to wit, the licenses of Oshman's Sporting Goods, the alleged licensed dealer in firearms, should have been admitted into evidence, when the only proof that they were valid and effective on the dates of the alleged offenses is the hearsay statement of the Supervisor of the Firearms and Explosives Licensing Section, since only renewal applications, subsequent in dates to the offenses, were admitted into evidence by the government supported by an affidavit of the Supervisor of the Firearms and Licensing Section issuing said licenses.

3. Whether the statute under which Petitioner was convicted, the National Firearms Act, unconstitutionally creates a distinction between persons who are convicted felons, and persons who are merely under indictment, in that felons can apply for an exemption from the statute, while persons merely under indictment are allowed no similar exemption. A similar impermissible, arbitrary distinction is made between those who are licensed dealers, importers, manufacturers or collectors of firearms, and those who are not.

STATUTES AND REGULATIONS INVOLVED

Petitioner's conviction was based upon 18 United States Code, Section 922(a)(6), and 922(h)(1). The evidentiary question depends upon the reading of 28 United States Code, Section 1733(a), while the provision of the Firearms Act which creates the unconstitutional distinction is 18 United States Code, Section 925(b) and (c). These statutes are reproduced as Appendix "B" hereto.

STATEMENT OF THE CASE

Petitioner was convicted of thirteen counts of violating 18 United States Code, Section 922(a)(6), making a false statement to a licensed dealer in firearms in connection with the acquisition thereof. The violations alleged in the indictment were having answered that he was a person who "had not been" indicted for a crime punishable by imprisonment for a term exceeding one year when in fact he "had been" indicted for crimes punishable by imprisonment for a term exceeding one year. He was sentenced to a term of eight years imprisonment, four years to serve on each of the first seven counts, to run concurrently, and four years to serve on each of the last six counts, to run concurrently, the second four-year term to run consecutive to the first.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW AFFIRMS A CONVICTION BASED UPON INDICTMENTS WHICH ARE CONSTITUTIONALLY DEFECTIVE, AND THIS COURT SHOULD REVIEW THE DECISION FOR THE PURPOSE OF RULING ON THE CONSTITUTIONALITY OF THE CONVICTION.

Each count of the Indictment against Petitioner alleges that Petitioner made statements to the effect that he "had not been" under Indictment for crimes punishable by imprisonment for more than one year. 18 United States Code, Section 922 (h)(1) states that it shall be unlawful for a person who "is under" indictment for such a crime to obtain a firearm. The offense charged under 18 United States Code Section 922(a)(6) is that Petitioner knowingly made false statements material to the lawfulness of the acquisition of firearms, in connection with the purchase thereof. The distinction is that the Indictment uses the past tense of the verb, to wit: "had been". The statute uses the present tense, to wit: "is". Petitioner admitted to "having been" under indictment prior to the offense, but believed that he was not presently under indictment at the time of the offense, there was therefore no way that the Jury could acquit Petitioner under the wording of the indictment. Had the Jury believed that he was not under indictment at the time of the offense, it could not acquit Petitioner because of his admission of having been under indictment prior to

the offense, and the wording of the indictment in the past tense was satisfied. The indictment allows an impermissible inference of guilt under the circumstances. Moreover, it is not an offense under the statute to make any statement concerning "having been" under indictment, as such condition would not be material to the lawfulness of the purchase of a firearm. Congress enacted legislation made the basis for this prosecution and conviction, containing the words "is under". Had Congress intended to include anyone, ever past or present, who "had been" under indictment, such language would have been used. The indictment fails to state an offense under the statute, and a conviction based on an indictment which does not charge an offense cannot stand, Walker v. United States, 342 F2d 22 (5 Cir. 1965) Cert. den. 382 US 859, 86 S. Ct. 117, Carlson V. United States, 296 F2d 909, (9 Cir. 1961).

2. THE OPINION BELOW RESTS UPON THE ADMISSION OF HEARSAY EVIDENCE, WHICH OFFENDS THE SIXTH AMENDMENT'S GUARANTY OF CONFRONTATION OF WITNESSES, AND CONFLICTS WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. THE COURT SHOULD REVIEW THE JUDGMENT FOR THE PURPOSE OF RESOLVING THIS CONFLICT AND DECIDING THE CONSTITUTIONAL QUESTION.

The conviction below depends upon the finding of a material element of the offense, that Oshman's Sporting Goods was a licensed

dealer in firearms at the time of the alleged offense. The offenses alleged occurred between the months of December, 1971, and May, 1972, inclusive. The licenses of Oshman's Sporting Goods reveal that they were secured and date-stamped by the Internal Revenue Service some months following the alleged offenses. The dates of the alleged offenses were: December 22, 1971, January 5, 1972, March 23, 1972, March 25, 1972, March 28, 1972, April 4, 1972, April 10, 1972, April 11, 1972, April 12, 1972, April 28, 1972, May 3, 1972, May 4, 1972, and May 8, 1972. The dates for the various applications for renewal of licenses by Oshman's Sporting Goods Company were: tendered August 18, 1972, stamped received by Internal Revenue Service August 22, 1972; tendered August 16, 1972, received August 18, 1972; tendered February 21, 1972, received February 23, 1972; tendered February 26, 1973, received March 2, 1973. (SEE Appendix "C"). The only evidence for the effectiveness of any licenses on the date of the offenses alleged, is the certificate of Geneva N. Schlinke, the Supervisor of the Firearms and Explosives Licensing Section, to that effect. It would not be possible, in the absence of that certificate, for the Jury to find that the licenses were valid and effective on the dates of the alleged offenses, or for the government to prove said fact, absence the license itself.

The effect of 28 United States Code Section 1733 is not to admit otherwise in-

competent evidence; the documents so certified must contain matters to which the certifying official could testify if called in person. Independent Iron Works, Inc., V. United States Steel Corp., 322 F2d 656 19 Cir. 1963, Cert. den. 375 US 922, 848 S. Ct. 267, 11 L. Ed.2d 165. Hearsay contained in official records or business is not admissible. Colvin V. United States 479 F2d 998 (9 Cir. 1973). Such records are not admissible either as business records or as public records. Mullican V. United States, 252 F2d 398, (5 Cir. 1958).

Government records, when admitted into evidence, cannot have a greater evidentiary value than they intrinsically possess. Southard V. United States 218 F2d 943 (9 Cir. 1955). The government made no effort to show that Miss Schlinke could have testified of her own knowledge as to the term of the licenses. The Court of Appeals concludes that the licenses were valid by statutory definition, (opinion, pages 2,3), but the Jury was not so instructed, and there is nothing on the face of the licenses which would show their effectiveness on the dates of the alleged offenses. Without this hearsay evidence, a material element of each count of the indictment against Petitioner fails. Moreover, the Court has a duty to insure that a record offered in evidence does not offend the Sixth Amendment guarantee of confrontation of witnesses. United States V. Lipscomb 435 F2d 795 (5 Cir. 1970).

The Fifth Circuit Court of Appeals, in their opinion of February 14, 1975, pages 3540-3541, appears to recognize the point made by the Appellant but believe said error, at most, to be harmless, and further to find support in the instrument absent any affidavit. I believe the Court misses the point that these exhibits were never completed until after the dates of the offenses charged, were never received by the Internal Revenue Service until after the dates of the offenses charged and were not licenses but only renewal applications. It is very apparent that the hearsay statement of Miss Schlinke was the only evidence which shows Oshman's to be a licensed dealer on the dates of the offenses and said error in no way could be considered harmless viewing the exhibits as what they are and not licenses covering the periods of time in question. The Court overlooked, in its opinion of February 14, 1975, the patent error in its reasoning by its statement of "a $10.00 license is by statutory definition in effect for one year" (page 3540 of its opinion). This becomes obvious in reading Miss Schlinke's affidavit which states in reference to the license of Oshman's located at 2250 Sharpstown Center, Houston, Texas, that said store "has been granted a license to engage in business as a dealer for the twenty-four month period ending April 30, 1973". When in fact she is speaking of an application for renewal filed months after the offense and not the license which was effective on the date of the offense. She further states

in her affidavit, in error, "that the attached record copies of licenses numbered 75-5913 . . . are true copies of such documents as retained in these records", when as already pointed out to the Court she is talking of renewal applications and not the applications effective on the dates of the offenses. The Appellant maintains that the government was obligated to produce and prove up the licenses which were effective on the dates of the offenses alleged. What the government did was prove that Oshman's filed to renew a license, that said renewal was filed after the date of the offense and with the hearsay statement of Miss Schlinke attempt to prove the existence of a license on the dates of the offenses. Why were the licenses not submitted? This question is now before this Honorable Court. Is this a sufficient basis to deprive one of his physical liberty for eight years?

3. PETITIONER'S CONVICTION RESTS UPON A STATUTE WHICH DENIES PETITIONER DUE PROCESS OF LAW, AND THE OPINION BELOW IS IN CONFLICT WITH A HOLDING OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. THIS COURT SHOULD REVIEW THE JUDGMENT FOR THE PURPOSE OF DECIDING THE CONSTITUTIONAL QUESTION, AND RESOLVING THIS CONFLICT.

18 United States Code, Section 925(b), allows a person who is under indictment for a felony, but who is a licensed importer,

manufacturer, dealer or collector of firearms to apply to the Secretary of the Treasury for an exemption from the harsh provisions of the National Firearms Act. Section 925(c) provides such an exemption for a private citizen who is a convicted felon. Nowhere in the Act is such relief offered a person, such as Petitioner, who is neither a convicted felon, nor a licensed collector, but only a person who is under indictment for a felony. The opinion below concludes that the distinctions are reasonable, and therefore constitutional, because persons under indictment for felony offenses might have a propensity for violence, while the economic hardship to a licensed dealer is said to justify an exemption for such persons while under indictment. The fundamental flaw of this rationale is that the statute is inconsistent in its application of the presumption of a propensity for violence. If a person who is under indictment for a felony, entitled to a presumption of innocence, is thought to have a propensity for violence such as to justify denial of his right to own firearms, how can a person who has been convicted of a felony, upon good and lawful evidence, be reasonably supposed to have any lesser propensity for violence, such as would entitle him to apply for an exemption from the prohibitions of the firearms act? If there is any rational basis for prohibiting persons under indictment for felonies from obtaining firearms, the prohibition should apply more, not less, stringently to per-

sons who are convicted felons. Further, if the economic hardship to a licensed dealer who is under indictment for a felony will justify a statutory exemption for him, how can the same rationale justify the exemption for a licensed collector of firearms, created in the same statutory provision? The inescapable conclusion of the matter is that there is no rational basis for the distinction drawn by the statute, or, that if such rational basis exists, it has been arbitrarily and capriciously applied. Under either view of the case, 18 United States Code, Section 925 creates an unconstitutional distinction between classes of persons similarly situated, so that persons convicted hereunder are denied due process of law under the Fifth Amendment to the United States Constitution.

In the case of Watson V. United States, 439 F2d 442 (D.C. Cir. 1968), the United States Court of Appeals considered a similar provision of the narcotic addict rehabilitation act, under which certain classes of addicts might be given a non-criminal disposition of their cases, and receive medical treatment rather than imprisonment. An addict demonstrably trafficking in narcotics might get such non-criminal treatment, but an addict who had twice been convicted of a felony could not. (439 F2d at 456). That Court said that "We think the discrimination between the two classes of addicts is constitutionally unacceptable", and held that ". . . That

the two-prior felony disqualifying exclusion of Title II, as applied to the Appellant on these facts, is unconstitutional under the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment." (439 F2d at 457).

The distinction drawn by 18 United States Code Section 925 similarly, but even more grossly, discriminates between classes of persons similarly situated. Petitioner, being merely under indictment of a felony, faces a statute which treats him more harshly than a felon, and, because he is not in the business of manufacturing, importing or selling firearms, nor is he a licensed collector, he is treated differently than are others who are likewise under indictment of felony. Such arbitrary discrimination denies him Due Process of Law, Davis V. Richardson, 342 F. Suppl. 588 (U.S. D.C., D.C. Conn. 1972) Aff'd., 409 U.S. 1069, 93 S. Ct. 678, 34 L. Ed. 2d 659, (and cases cited therein).

The Court, in its opinion of February 14, 1975, page 3541, in discussing this point recognizes that "the private citizen under indictment has no such recourse or period of grace" but fails to consider the Fifth Amendment implications of such a statute or act of Congress. It is submitted by the Appellant that when such a distinction is made by the Congress, and there is no basis for treating classes of citizens differently, then such a distinc-

tion cannot survive the scrutiny of the Fifth Amendment of the Constitution of the United States of America, especially as here, when the distinction results in the loss of liberty.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted, and the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of April, 1975, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

EDWARD H. GERSTENFIELD

UNITED STATES of America, Plaintiff-Appellee,

v.

Charles Lowe SNELL, Defendant-Appellant.

No. 74–3126
Summary Calendar.*

**United States Court of Appeals,
Fifth Circuit.**

Feb. 14, 1975.

By a judgment of the United States District Court for the Southern District of Texas, at Houston, Allan B. Hannay, J., the defendant was convicted on 13 counts of violating statute making it illegal to give a false statement to a licensed firearms dealer in connection with acquisition of guns. The defendant appealed. The Court of Appeals held, inter alia, that indictment was sufficient, that the licensed firearms dealer's applications were properly admitted to show the effective date of license, that Treasury forms were properly admitted as business forms and that the statute did not violate Fifth Amendment rights of defendant.

Affirmed.

1. Weapons ⇐17(1)

Indictment charging defendant with making a false statement to licensed firearms dealer in connection with acquisition of shotgun and a number of pistols accurately and sufficiently charged defendant with all essential elements of the statutory offense, since the alleged discrepancies raised by defendant involved either omissions not required in indictment or semantic difficulties of no legal consequence. 18 U.S.C.A. § 922(a)(6).

* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5th Cir. 1970, 431 F.2d 409, Part I.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

2. Weapons ⇐17(4)

The license applications of firearms dealer showing expiration date were alone sufficient to show that dealer was a licensed dealer at time of the firearms sales in question giving rise to prosecution of defendant for making a false statement to licensed firearms dealer in connection with acquisition of guns, since license application on its face indicated that it was, by a statutory definition, in effect for one year and therefore was effective during period of weapons sale. 18 U.S.C.A. §§ 922, 922(a)(6).

3. Criminal Law ⇐1169.2(7)

Since the properly admitted firearms dealer's license applications showed on their face that dealer was licensed at time of sale giving rise to prosecution for making of false statement to firearms dealer, admission of affidavit by government agent attesting to effective period of dealer's license, if error, was harmless. 18 U.S.C.A. §§ 922, 922(a)(6).

4. Criminal Law ⇐436

Where record, in prosecution of defendant for making false statements to licensed firearms dealer in connection with acquisition of guns, clearly reflected that the Treasury forms were kept under proper custody and in the regular course of business as required by law and that the defendant or a salesman at defendant's direction prepared each form, such forms were properly admitted as a business record despite claim of defendant that the records were kept at different stores and that some of the salesmen were no longer employed by the dealer at time of trial. 18 U.S.C.A. §§ 922, 922(a)(6).

5. Constitutional Law ⇐258(3)
Weapons ⇐3

Statute making it an offense to give false statement to licensed firearms dealer in connection with acquisition of guns did not, in context of defendant's case, violate Fifth Amendment rights of due process of defendant, who had falsely stated he was not under indictment for crime punishable by imprisonment for a term exceeding one year when he was in

fact under such an indictment, based on assertion that statute unconstitutionally discriminated between classes of persons including convicted felons and licensed dealers, who could obtain some relief, on the one hand and indicted private citizens on the other. 18 U.S.C.A. § 922; U.S.C.A.Const. Amend. 5.

Appeal from the United States District Court for the Southern District of Texas.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

Appellant, Charles Lowe Snell, was convicted of 13 counts of violating 18 U.S.C. § 922(a)(6), making a false statement to a licensed dealer in firearms in connection with the acquisition of a shotgun and a number of pistols.[1] He was sentenced to a total term of 8 years imprisonment. The appellant claims four errors were committed during his trial. After careful review of the briefs and record we find the appellant's contentions to be without merit.

[1] The appellant first argues that the indictment was insufficient in that it failed to apprise him of the nature of the charges, and failed to charge an offense under 18 U.S.C. § 922(a)(6). A comparison of the provisions of 18 U.S.C. § 922(a)(6) with the allegations of the indictment clearly shows that the indictment accurately and sufficiently charged the appellant with all the essential elements of the statutory offense. The alleged discrepancies raised by appellant involve either omissions not required in an indictment or semantic difficulties of no legal consequence.

1. In connection with the purchase of each weapon the appellant indicated on Department of the Treasury, Internal Revenue Service Form 4473 Part 1 (Rev. 6–70), "Firearms Transaction Record," that at the time of the sale he was not under indictment in any court for a crime punishable by imprisonment for a term exceeding one year. In fact, at the time of each purchase appellant was under such an indictment for violations of Texas law.

[2, 3] The appellant's next specification of error concerns the admission of firearm dealer license applications provided by the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury Department. These license applications specify an expiration date but fail to reveal the date the license was issued. Therefore, reasons the appellant, the applications are insufficient proof of the statutorily required "licensed" status of the dealer necessary at the time of the firearms sales made the basis of this prosecution.[2] The appellant argues that the only other proof showing dealer licenses were effective at the time of the firearms purchases was supplied by Geneva N. Schlinke, a supervisor of the licensing section of the Alcohol, Tobacco and Firearms Bureau. In her affidavit attesting to the official nature of the licensing records Schlinke included a reference to the periods for which the dealer was effectively licensed. The appellant argues that her statement with respect to the critical date of license issuance was hearsay and should have been excluded. Assuming arguendo that the appellant is correct, the license applications alone are sufficient to show that Oshman's Sporting Goods Company was a "licensed" dealer at the time of the firearm sales in question. A dealer, depending on the type of business in which he cares to engage, must specify the kind of license desired by checking the application form's appropriate box. The Oshman dealer applied for and obtained a $10.00 license with an expiration date of October 11, 1972. A $10.00 license is by statutory definition in effect for one year.[3] Therefore, the license application on its face indicates license effectiveness during the period of the weapons sales for which appellant was indicted. Assuming, without deciding, that error was

2. Title 18 U.S.C. § 922
(a) It shall be unlawful
(6) for any person in connection with the acquisition or attempted acquisition of any firearm . . . from a . . . licensed dealer . . . to make any false . . . statement . . . .

3. See 18 U.S.C. § 923.

committed in admitting Schlinke's statement, the same was harmless.

[4] The third contention of the appellant is that the trial court erroneously admitted Department of the Treasury forms 4473 because there was no proper showing that the forms were business records.[4] On the contrary, the record clearly reflects that 4473 forms were kept in the regular course of business as required by law and that the appellant, or a salesman at appellant's direction, prepared each form. In every instance of a firearm sale the appellant signed the appropriate form 4473. The fact that the records were kept at different stores and that some of the salesmen were no longer employed by Oshman's at the time of the trial does not detract from the reliability of the records. Bridger v. Union Ry. Co., 355 F.2d 382 (6th Cir. 1966). The records were clearly under proper custody and kept as a matter of routine in the ordinary course of business.

[5] The fourth and final argument of appellant is that 18 U.S.C. § 922 violates his fifth amendment right to due process. He claims the statute unconstitutionally discriminates between classes of people including convicted felons and licensed dealers on the one hand and indicted private citizens on the other. For example, a convicted felon may apply to the Secretary of the Treasury for relief from statutory disabilities and a licensed dealer may continue his business pending the ultimate resolution of indictment charges. The private citizen under indictment has no such recourse or period of grace. While it is true that statutory classifications may be so unreasonable as to be violative of the Fifth Amendment's due process clause, Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), such an assertion is patently frivolous in the context of the instant case. Certainly it was reasonable for Congress to conclude that citizens indicted for offenses punishable by prison terms of more than one year often demonstrate a propensity for violence and that they should therefore

4. See footnote 1, *supra*.

be restrained from acquiring personal arsenals. United States v. Craven, 478 F.2d 1329 (6th Cir. 1973). See also United States v. Lebman, 464 F.2d 68 (5th Cir. 1972). On the other hand, it was obviously reasonable for Congress to ameliorate the devastating effect that strict adherence to section 922 would have with respect to the conduct of a licensed firearms dealer's business.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 74

No. 74-3126
Summary Calendar

D. C. Docket No. 72-H-328-CR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES LOWE SNELL,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 14, 1975

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAR 24 '75
EDWARD W. WADSWORTH
CLERK

NO. 74-3126

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES LOWE SNELL,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(March 24 , 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b) (3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machine-gun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides (or other than that in which its place of business is located if the transferor is a corporation or other business entity); except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes; and

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.

(2) any firearm or ammunition to any person in any State where the purchase or possession by such person of such firearm or ammunition would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

the Secretary of the Army, to engage in military training or in competitions.

(3) Unless otherwise prohibited by this chapter or any other Federal law, a licensed importer, licensed manufacturer, or licensed dealer may ship to a member of the United States Armed Forces on active duty outside the United States or to clubs, recognized by the Department of Defense, whose entire membership is composed of such members, and such members or clubs may receive a firearm or ammunition determined by the Secretary of the Treasury to be generally recognized as particularly suitable for sporting purposes and intended for the personal use of such member or club.

(4) When established to the satisfaction of the Secretary to be consistent with the provisions of this chapter and other applicable Federal and State laws and published ordinances, the Secretary may authorize the transportation, shipment, receipt, or importation into the United States to the place of residence of any member of the United States Armed Forces who is on active duty outside the United States (or who has been on active duty outside the United States within the sixty day period immediately preceding the transportation, shipment, receipt, or importation), of any firearm or ammunition which is (A) determined by the Secretary to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of firearm normally classified as a war souvenir, and (B) intended for the personal use of such member.

(5) For the purpose of paragraphs (3) and (4) of this subsection, the term "United States" means each of the several States and the District of Columbia.

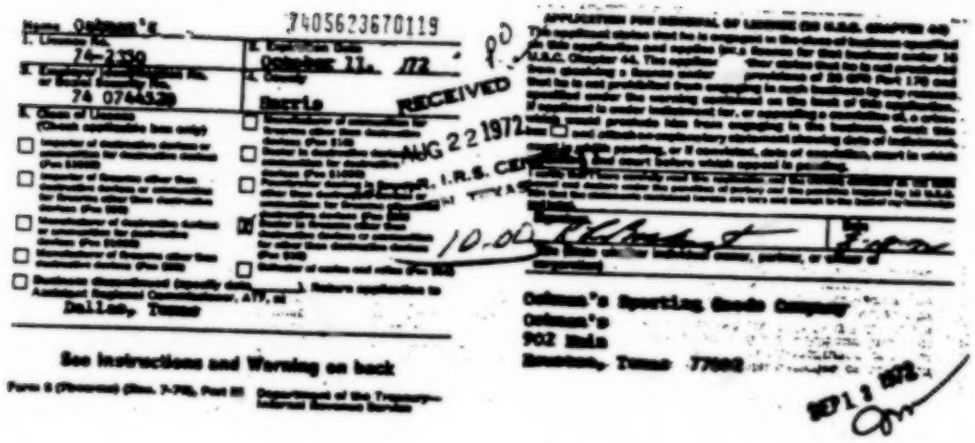
(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

(c) A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

(d) The Secretary may authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm or ammunition establishes to the satisfaction of the Secretary that the firearm or ammunition—

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

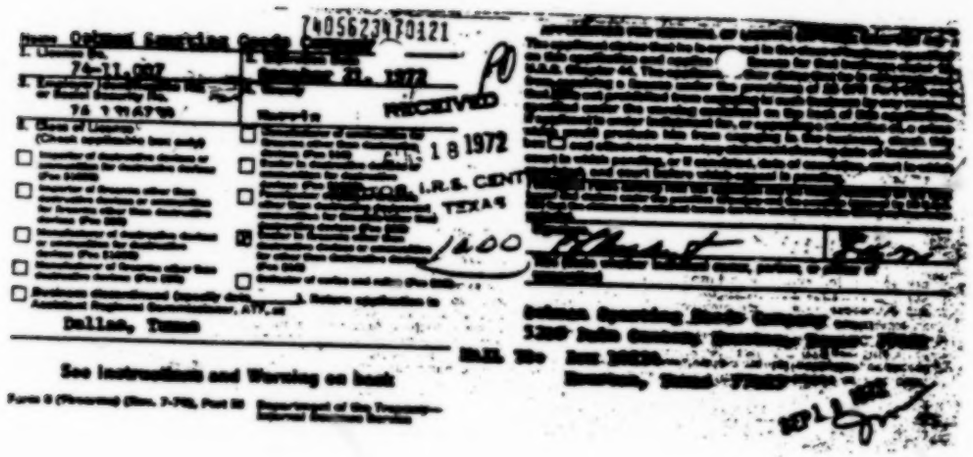
C-1



74-3126

Gov't Ex 3

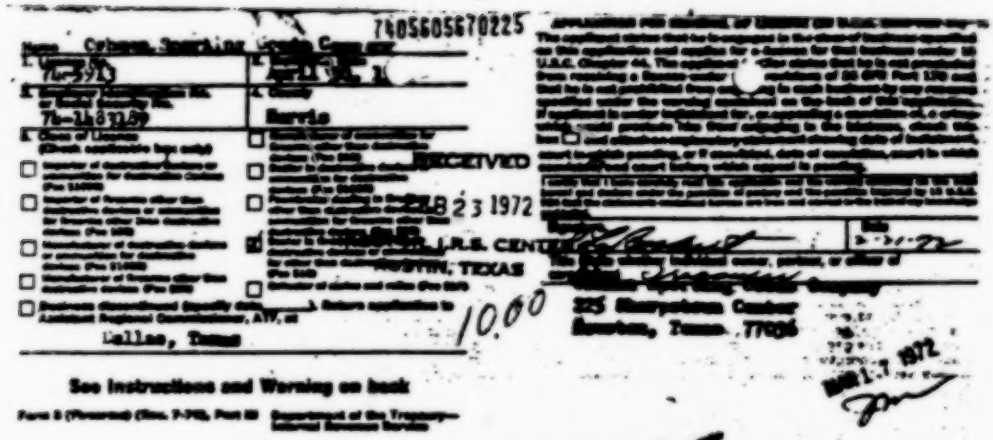
C-2



74-3126

Govt. Ex. 4

BEST COPY AVAILABLE



7405605670225

Name: Coleman Sporting Goods Co.

1. License No. 74-5913

2. Expiration Date April 30, 19

3. Employer Identification No. or Social Security No. 74-1467159

4. County Harris

5. Class of License (Check applicable box only)

RECEIVED
AUG 23 1972
I.R.S. CENTER
AUSTIN, TEXAS

10.00

Dallas, Texas

See Instructions and Warning on back

Form 3 (Proposed) (Rev. 7-72), Part III — Department of the Treasury — Internal Revenue Service

APPLICATION FOR RENEWAL OF LICENSE OR BLANK REGISTRATION

The applicant states that he is engaged in the above-of business specified on this application and applies for a license for that business under 26 U.S.C. Chapter 44. The applicant further states that he is not precluded from receiving a license under the provisions of 26 CFR Part 178 and that he is not prohibited from engaging in such business by any reasons specified under the warning contained on the back of this application. Applicant is under indictment for, or appealing a conviction of, a crime which would preclude him from engaging in the business, attach this sheet and attach an explanatory statement showing date of indictment, court in which pending or, if convicted, date of conviction, court in which convicted, and court before which appeal is pending.

I certify that I have carefully read the applicable part of the Internal Revenue Code and the regulations issued thereunder and to the best of my knowledge and belief my application and the statements made in it are true, correct, and complete.

Signature: [illegible]

Title (State whether individual owner, partner, or officer of corporation): [illegible]

Date: 3-24-72

Coleman Sporting Goods Company
225 Sharpstown Center
Houston, Texas 77036

MAR 27 1972

74-3126

7405606470149

Name: Coleman Sporting Goods Company

1. License No. 74-5913

2. Expiration Date April 30, 1973

3. Employer Identification No. or Social Security No. 74-1467159

4. County Harris

5. Class of License (Check applicable box only)

RECEIVED
MAR 02 1973
I.R.S. CENTER
AUSTIN, TEXAS

10.00

Dallas, Texas

See Instructions and Warning on back

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I certify that I have carefully read the applicable part of the Internal Revenue Code and the regulations issued thereunder and to the best of my knowledge and belief my application and the statements made in it are true, correct, and complete.

Signature: [illegible]

Title (State whether individual owner, partner, or officer of corporation): [illegible]

Date: 2-26-73

Coleman Sporting Goods Company
225 Sharpstown Center
Houston, Texas 77036

MAR 28 1973

Gvt. Ex. 5

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
JUN 20 1975
MICHAEL RODAK, JR., CLERK

No. 74-1313

In the Supreme Court of the United States

OCTOBER TERM, 1974

CHARLES LOWE SNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1313

CHARLES LOWE SNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the indictment is defective, that documentary evidence used to prove an element of the offense was not probative, and that the Gun Control Act of 1968 unconstitutionally discriminates against persons under indictment.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on thirteen counts of violating 18 U.S.C. 922(a)(6) by stating on Internal Revenue Service Form 4473 Part I, "Firearms Transaction Record," that he was not under indictment for a crime punishable by imprisonment for a term exceeding one year, knowing such statements to be false, in connection with the purchase from a federally-licensed dealer of one shotgun and fourteen pistols on thirteen occasions between December 22, 1971, and May 8, 1972. Petitioner was sentenced to four years'

imprisonment on each count. The sentences on the first seven counts were to run concurrently with one another, and the sentences on the last six counts were to run concurrently with one another, but consecutively to the sentences on the first seven counts. Petitioner thus was given a total of eight years' imprisonment, subject to immediate parole eligibility under 18 U.S.C. 924(a). The court of appeals affirmed (Pet. App. A; 508 F.2d 21).

1. The undisputed evidence established that petitioner, who was at the time under indictment in Texas for offenses carrying penalties of imprisonment in excess of one year, purchased from the Oshman Sporting Goods Company, at two different locations, fifteen weapons on thirteen separate occasions between December 22, 1971 and May 8, 1972. In connection with each purchase, petitioner executed and signed a Firearms Transaction Record, Form 4473, on which he falsely stated that he was not under indictment for a crime punishable by imprisonment for more than one year. Oshman Sporting Goods' status as a federally-licensed dealer at the time of the offenses was established by documentary evidence.

2. Petitioner contends (Pet. 5-6) that the indictment, which charged in each count that on a certain date petitioner falsely stated that "he had not been indicted" for a crime, is defective because the actual false statement was his negative response to the question, "Are you under indictment * * *?" Petitioner claims that under the wording of the indictment, the jury could have convicted him even if the Texas indictments had been dismissed at the time he purchased the firearms. Petitioner did not contend, however, that the Texas indictments had been dismissed.[1] Rather, he testified that at the time of the purchases he *believed* they had been dismissed.

[1]The evidence established that in fact the Texas indictments were pending at the time of the offenses involved here. Thus, the danger that the wording of the indictment would permit conviction where indictments had been dismissed, is not present in this case.

Petitioner's belief was relevant to whether his statements were knowingly false, as required by 18 U.S.C. 922(a)(6) and the language of the indictment, and if the jury had believed his testimony, it would have acquitted him on the ground that his statements, although false were not knowingly made. The language of the indictment would not have been a bar to his acquittal on such a ground. Any discrepancy between the language of the indictment and the false statement on the Firearms Transaction Records was, as the court of appeals held (Pet. App. A A-3), a "semantic difficult[y] of no legal consequence.[2]

3. Petitioner contends that the evidence that the false statements were made to a licensed dealer did not prove that the dealer was licensed when the purchases were made.

Rule 44, Fed. R. Civ. P. (which applies in criminal cases, see Rule 27, Fed. R. Crim. P.), provides that an official record may be proved by "a copy attested by the officer having the legal custody of the record * * * and accompanied by a certificate that such officer has the custody." The certificate may be made by "any public officer having a seal of office and having official duties in the district * * * in which the record is kept, authenticated by the seal of his office." Government exhibits 3

[2]Petitioner raises (Pet. 2-3), but does not argue, the question whether the indictment charged an offense and adequately apprised him of the nature of the charges. This contention was rejected by the court of appeals (Pet. App. A A-3), which correctly held that the indictment was sufficient to charge a violation of 18 U.S.C. 922(a)(6) and to apprise petitioner of the nature of the charges.

and 4, which established[3] that Oshman's was a licensed dealer at the time of the purchases, complied with Rule 44. Billy L. Gaunt, Regional Director of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, certified, under the seal of the Treasury Department, that Geneva N. Schlinke, Supervisor, Firearms and Explosives Licensing Section, had custody and control of official records and documents pertaining to firearms licenses in the Southwest Region (which includes Texas). Geneva N. Schlinke attested that the copies of the Oshman licenses introduced as part of government exhibits 3 and 4 were true copies of the documents retained by the bureau and that Oshman's was licensed at both locations at the time petitioner purchased the firearms.

Petitioner claims that this evidence was not probative because the copies of the licenses bear the heading "Application for Renewal of License" and because they do not indicate the effective date of the license but only the expiration date.

The copies of the licenses contained in the exhibits are actual copies of the Oshman licenses. A federal dealer's license is the original and first page of a multi-carbon-copy form.[4] When the license is issued, the name of the licensee, the license number, and the expiration date are

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[3]Petitioner purchased firearms at two Oshman locations in Houston, 902 Main Street and 5208 Palms Center. Government exhibits 3 and 4 were identical, except that the former related to the Main Street location and the latter to the Palms Center location.

[4]For purposes of illustration, we are lodging with the Clerk of this Court a blank dealer's license form of the edition in use at the time petitioner purchased the firearms in late 1971 to mid-1972.

simultaneously typed in the license and several copies. The third copy of the license is denominated a renewal form, and is retained by the Bureau of Alcohol, Tobacco and Firearms until about two months prior to expiration of the current license, when it is mailed to the licensee for execution and remission of the renewal fee (see 26 C.F.R. 178.45). After return of the renewal application and fee, the regional office copy of the prior license is destroyed, the executed renewal application retained, and a new license issued. Therefore, the attestations of the custodian of the records that the documents were copies of the Oshman licenses were correct.

The licenses indicate expiration dates of October 11 and October 21, 1972. Since licenses are issued for a period of no less than one year, 18 U.S.C. 923(a)(3)(C), 26 C.F.R. 178.49, the licenses were, as the custodian of records attested, in effect during the period from December, 1971, to May, 1972, when petitioner purchased the firearms.

4. Petitioner contends that the Gun Control Act of 1968 unconstitutionally discriminates against persons under indictment. Whether penal statutory classifications violate the due process clause of the Fifth Amendment depends on whether the classifications are reasonable in light of the legislative purpose. The court of appeals correctly held (Pet. App. A A-5) that the classifications challenged by petitioner are constitutionally valid.

a. The fact that convicted persons may apply to the Secretary of the Treasury for relief from the statutory disabilities (18 U.S.C. 925(c)), while similar grace provisions are not available to persons under indictment, does not offend due process. In contrast to conviction, indictment is only a temporary bar to the purchase of

firearms. Congress could reasonably limit the provision for relief to conviction, which would otherwise be a permanent prohibition.

b. Petitioner derives no support from the fact that a licensed dealer under indictment may continue operation of his business during the pendency of the indictment (18 U.S.C. 925(b)). As the court of appeals concluded (Pet. App. A A-6), it was reasonable for Congress to ameliorate the potentially devasting effects that an indictment could have on a dealer's livelihood. No such consequences flow from the statutory bar applicable to unlicensed persons under indictment, such as petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

DOJ-1975-06